



“Dual Protection in European Asylum Law: Good or Bad for those Seeking Subsidiary Protection?”

Thesis L.L.M. European Law 2008-2009

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Word Count: 14.941
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1. Introduction and Background

A major change has taken place in the operation of asylum law in Europe when in September 2001 a proposal was introduced for an EC Directive setting out a harmonized asylum policy for all EU member states. In 2004 the Member States of the European Union adopted the Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection (hereinafter, the Qualification Directive)¹. This Directive forms one of the European Commission's 'building blocks' towards a Common European Asylum System (CEAS), intended to harmonize and streamline legal standards relating to asylum in the Member States of the EU². This CEAS was established by both the Tampere (1999-2004) and The Hague program (2005-2010). The objective of these programs is to construct an 'Area of Freedom, Security and Justice' across the EU and to set up a common immigration and asylum policy for the 27 Member States, thereby creating a supranational system that guarantees third-country nationals a certain level of protection under equivalent conditions in the different EU Member States.

The rights of individuals seeking refugee status were - and are - covered by international law, specifically the Refugee Convention 1951. Over 75 % of asylum seekers, however, do not fall under the definition of a refugee as enshrined in the 1951 Convention³. EU Member States recognize this protection gap and realized that many of those seeking asylum although not qualifying as refugee are rightfully in need of international protection. Following extensive jurisprudence of the ECtHR under art. 3 ECHR, a practice developed to afford these individuals complementary protection. This practice was however not codified and solely based on jurisprudence. As a consequence divergences in asylum policies existed between the EU Member States.

¹ Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted 8043/04 ASILE 23 (27 April 2004) ('Directive').

² F. Roscam-Abbing, "Subsidiary Protection: Improving or Degrading the Right of Asylum in Europe?" in D. Bouteillet-Paquet, *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* Brussels: Bruylant, 2002, p. 47.

³ D. Bouteillet-Paquet, "Subsidiary Protection: Progress or set-back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union", in D. Bouteillet-Paquet, *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* Brussels: Bruylant, 2002, p. 216.

In an attempt to overcome such divergences, EU Member States have moved asylum matters from the Third to the First Pillar, ceding much of their national asylum and asylum related human rights law to European governance. With the implementation of the Qualification Directive in October 2006, asylum related human rights law has irreversibly changed and the Qualification Directive is the first (supranational) legally binding instrument in Europe that imposes an obligation on states to grant asylum to refugees and other persons in need of protection, removing complementary protection issues from the sphere of purely national discretion and placing them within the competency of the EU.

As a consequence, Member States of the European Union are currently faced with dual systems affording subsidiary protection to asylum-seekers. On the one hand, they are bound by supranational EC law, particularly the Qualification Directive, and on the other hand, they are bound by obligations arising from the ECHR, most specifically, art. 3 ECHR under which a foreigner may not be deported when there is a serious reason to believe that he or she will be subjected to torture or to inhuman or degrading treatment or punishment (prohibition of non-refoulement).

The relation between the Community legal order and obligations arising from art. 3 of the ECHR, raises complex questions. According to the EC Treaty, measures relating to asylum must be in accordance with the ECHR and other international treaty law on asylum. Yet, the ECHR binds the EU Member States, not the Community itself. The complexity of these questions is illustrated in the recent *Elgafaji* judgment and is further exemplified by the criticism the Netherlands recently received from the Council of Europe on its asylum policy⁴. The consequences of the transfer of powers on asylum to the Community as a result of implementation of the Qualification Directive under the ECHR are uncertain. Can Community legislation influence their obligations arising out of the ECHR? Is there now a system of dual protection and if so is that good or a bad, when looked upon from an organizational perspective or from that of the individual seeking protection?

⁴ “Kritiek Raad van Europa op Asielbeleid”, *NRC Handelsblad*, 11 March 2009.

These are questions which I aim to analyze in this thesis. I will focus on complementary/subsidiary protection as this concerns 75 % of asylum applicants in the EU⁵. Furthermore, much work has already been done on comparison between the Qualification Directive and the Refugee Convention, but relatively little has been written on comparison between complementary protection under art. 3 ECHR and subsidiary protection under the Qualification Directive. Both the high percentage of asylum seekers granted subsidiary protection and my interests as an EU student in European law were the main incentives to undertake this study.

1.2 Aim and Research Questions

The global aim of this research is to investigate possible discrepancies and problems in asylum related human rights law as a consequence of dual protection provided under the Community legal order and the ECHR.

The focus is on the relationship between the Community legal order and the ECHR with regard to subsidiary protection. My research questions concern how subsidiary protection as laid down in the Qualification Directive relate to obligations arising out of the ECHR, and can be specified as follows:

1. *Are there differences in legislation between non-refoulement obligations under art. 3 ECHR and subsidiary protection as laid down in the Qualification Directive?*
2. *Has the importance of specific distinguishing aspects in individual cases become less relevant following the introduction of the Qualification Directive and the ECJ's interpretation thereon presented in *Elgafaji v Staatssecretaris v Justitie*?*
3. *Are different rulings from the ECJ and the ECtHR on similar issues of complementary protection conceivable?*
4. *Is the dual protection currently provided by subsidiary protection under the Qualification Directive and non-refoulement obligations under the ECHR good or bad for the individual seeking protection?*

⁵ D. Bouteillet-Paquet, "Subsidiary Protection: Progress or set-back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union", in D. Bouteillet-Paquet, *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* Bruylant: Brussels, 2002, p. 216.

2. Methodology and Structure

For analysis of the research questions I will discuss the relevant legislation as contained in art.3 ECHR and in the Qualification Directive, and analyse differences and similarities. The protection provided for by the ECHR will be further examined by review of existing case law. In the absence of case law on the Qualification Directive, this analysis will remain mainly theoretical. Special consideration will, however, be given to the *Elgafaji* judgement, as this is the single existing ruling of the ECJ on the Qualification Directive. The possible consequences of the ruling and the relative benefits and disadvantages of dual protection will be discussed in detail. It is not my intention to give a detailed description of EU asylum policy, nor is this research designed to give a comprehensive assessment of the protection provided for by the Community legal order or art. 3 ECHR. My research is further limited by geography (Europe) and by time (last decade). The analysis is presented in four chapters:

- *Chapter 3*

Chapter 3 will focus on the general nature of the relationship between the Community legal order and the ECHR; How do they affect each other? This issue will be approached from the perspective how the ECHR may affect the Community legal order, and conversely how Community law may affect the ECHR. The extent of Member States' responsibilities under the Convention will be analyzed with reference to the *Bosphorus* case.

- *Chapter 4*

Chapter 4 focuses on the concept of complementary protection and specifically how complementary protection in the EU is regulated under the Community legal order and ECHR respectively with an orientation on the concepts of subsidiary protection and the prohibition of refoulement.

- *Chapter 5*

Chapter 5 focuses more in detail on the concepts of non-refoulement and subsidiary protection, approaching these from the perspective of the individual in need of protection. Particular importance will be paid to factors determining subsidiary protection and the prohibition on refoulement, i.e. the type and probability of harm. Furthermore, the character of the obligations will be studied, e.g. whether the prohibition is considered absolute or non-absolute. These conditional requirements and character of the obligation will be differentiated for prohibition on refoulement under the ECHR and subsidiary protection under the Qualification Directive.

- *Chapter 6*

Chapter 6 will introduce the *Elgafaji* judgment in which the ECJ addressed the question whether art. 15 of the Qualification Directive offers similar protection as art. 3 ECHR.

- *Chapter 7*

Chapter 7 will evaluate and analyze the similarities and differences between art. 3 ECHR and the qualification Directive: do they offer similar protection? If not, what implications does this have? Similarities and differences will be analyzed from an organizational perspective and from the perspective of the individual. I will discuss both these perspectives and finally address the consequences of dual protection. Where appropriate reference will be made to the *Elgafaji* judgment. Analysis will include a critical discussion as to what consequences the judgment may have in relation to the *Bosphorus*-doctrine, i.e. what happens when the *Elgafaji*'s are expelled and they decide to lodge a complaint before the ECtHR in Strasbourg?

3. General Nature Relationship Community Legal Order-ECHR

This chapter provides an overview of the legal status and general nature of the relationship of the Community legal order and the ECHR in order to set the foundations for the critical discussion in the following chapters.

3.1 The way the ECHR affects the Community legal order

This paragraph discusses whether and to what extent the Community is bound to comply with the ECHR and if this differs from the way the Member States are bound.

3.1.1 The ECHR and Strasbourg jurisprudence as Source of General Principles of Community Law

Formally, the Community is not party to the Convention, and the Community is therefore not legally bound by the ECHR⁶. By substitution however, and following the insistence of some national courts that the supremacy of Community law could not be accepted if Community law jeopardized national constitutional human rights protection, the ECJ has considered that the ECHR is of ‘special significance’⁷ which ‘must be taken into consideration in Community law’⁸. Subsequently, the ECJ has used the ECHR as a ‘point of orientation’⁹ in order to ‘inspire’¹⁰ the Community protection of human rights by extrapolating underlying principles of the Convention in order to apply them as general principles of Community law. General principles of law can be applied to interpret EC/EU measures, to rule on their validity¹¹, and Member State acts within the scope of Community law may be invalidated or interpreted in light of the general principles¹². According to art. 46 (d) TEU, all acts by Community institutions must comply with general principles of Community law.

⁶ ECJ *Opinion 2/94* (1996) ECR I-1759.

⁷ ECJ C-260/89 *ERT* (1991) ECR I-2925 para 41; ECJ *Opinion 2/94* (1996) ECR I-1759, paragraph 33.

⁸ ECJ C-222/84 *Johnston v Chief Constable of the R U C*, (1986) ECR 1651, 1682.

⁹ M. Dauses, “The Protection of Fundamental Rights in the Community Legal Order”, 1985, *European Law Review* 10, p. 401.

¹⁰ ECJ C-4/73 *Nold Kohlen- und Baustoffgrosshandlung v Commission*, (1974) ECR 491, p. 507.

¹¹ S. Peers, “Human Rights in the EU legal Order: Practical Relevance for EC Immigration and Asylum Law”, in S. Peers et al. *EU Immigration and Asylum Law Text & Commentary*, 2006, p. 122

¹² S. Peers, *Ibid* note 11 above, p. 122.

Primary EU law thus offers a basis for testing Community acts against fundamental principles of Community law. Despite the absence of any direct reference to human rights in the initial Community Treaties, the indirect application of the ECHR has now been codified. Art. 6 TEU stipulates:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms....and as they result from the constitutional traditions common to the Member States, as general principles of Community law”.

According to now firmly established case-law of the ECJ:

“Fundamental rights form an integral part of the general principles of Community law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention of Human Rights has special significance in that respect¹³”.

The ECHR is thus indirectly applied in the Community legal order by means of general principles of law and plays a predominant role as a source of the general principles. In addition, the role of the ECtHR as a source of Community law has in recent years dramatically increased¹⁴, and the ECJ has effectively incorporated the decisions of the ECtHR in its human rights jurisprudence¹⁵. The Court of First Instance (CFI) and the ECJ have made over thirty references to judgments of the ECtHR since 1996¹⁶. This is indeed striking, since citation by the ECJ to the case law of another court is unusual¹⁷. Not only do the CFI and the ECJ refer to Strasbourg jurisprudence, but they also follow its interpretation as illustrated by judgments such

¹³ ECJ *Opinion 2/94* (1996) ECR I-1759 , paragraph 33.

¹⁴ S. Peers, “Human Rights in the EU legal Order: Practical Relevance for EC Immigration and Asylum Law”, in S. Peers et al. *EU Immigration and Asylum Law Text & Commentary*, 2006, p. 124.

¹⁵ E. Defeis, “Dual System of Human Rights: the European Union”, 2007-2008, *ILSA International and Comparative Law*, Vol. 14.

¹⁶ S. Peers, “Human Rights in the EU legal Order: Practical Relevance for EC Immigration and Asylum Law”, in S. Peers et al. *EU Immigration and Asylum Law Text & Commentary*, 2006, p. 124.

¹⁷ F. Jacobs, “The European Convention on Human Rights, the EU Charter on Fundamental Rights and the European Court of Justice: The Impact of European Union accession to the European Convention on Human Rights”, in I. Pernice et al. *the Future of the European Judicial System in a Comparative Perspective*, 2006, pp. 291-292.

as *Baustahlgewebe*¹⁸, *Krombach*¹⁹, and *Karner*²⁰. Remarkably, the ECJ has also been willing to reconsider its own case-law in view of subsequent developments in Strasbourg as illustrated by *Roquette*²¹, overruling *Hoechst*²². The ECJ has recently confirmed that in some cases EC legislation aims to give effect to rights set out in the ECHR, and so must be interpreted in light of the ECHR, including the judgments of the Strasbourg Court²³. This is particularly relevant to the issue of subsidiary protection which is addressed both by EC law and by the ECHR.

3.1.2 The Scope of the General Principles of Community law

The scope of the general principles comprises acts of the EU institutions²⁴, acts of Member States derogating from free movement law²⁵ and acts of Member States implementing EU measures²⁶. The ECJ has not had an opportunity to determine whether the actions of the Member States implementing or derogating from Community law outside the territory of the Community are subject to general principles to the extent that the actions of Member States outside their territory are subject to the ECHR²⁷. Clearly, human rights constitute a standard of legality of EC legislation in the field of asylum, but the Court of Justice has held that “fundamental rights are not absolute rights but must be considered in relation to their social function²⁸” and has stated that:

¹⁸ ECJ C-185/95, *Baustahlgewebe*, (1998), ECR I-8417.

¹⁹ ECJ C-7/98 *Krombach*, 28 March (2000), ECR I-1395

²⁰ ECJ C-71/02, *Karner*, 25 March (2004), ECR I-3025

²¹ ECJ C-94/00, *Roquette Freres*, (2002) ECR I-9011; Costa, “The Relationship between the European Convention on Human Rights and European Union law- A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice”, London October 7th 2008, Lecture at King’s College.

²² ECJ C-227/88, *Hoechst v Commission*, (1989) ECR 2859.

²³ ECJ Joined cases C-465/00, C-138/01, and C-139/01 *Osterreichischer Rundfunk* (2003) ECR I-4989.

²⁴ Ever since the *ERT* judgment (ECJ C-260/89 *ERT* (1991) ECR I-2925), respect for human rights is a condition of the lawfulness of European Union acts.

²⁵ S. Peers, “Human Rights in the EU legal Order: Practical Relevance for EC Immigration and Asylum Law”, in S. Peers et al. *EU Immigration and Asylum Law Text & Commentary*, 2006, p. 117; See also ECJ C-5/88 *Wachauf* (1989) ECR 2609 and ECJ C-260/89 *ERT* (1991) ECR I-2925.

²⁶ In the realm of asylum law this concerns member state acts that implement or apply Community legislation on asylum.

²⁷ See for example ECtHR, *Issa v Turkey*, Judgment of 16 November 2004, Appl. No. 31821/96, paragraph 71 in which the ECtHR held that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory.

²⁸ ECJ Joined cases C-20/00 and C-64/00 *Booker Aquaculture* (2003) ECR I-7411, paragraph 68.

“restrictions may be posed on the exercise of human rights, in particular in the context of a common organization of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights²⁹”.

General principles of EC law are not confined to ECHR rights and their scope is sometimes even considered to be wider³⁰. The ECJ has confirmed that a number of rights *not* set out in the ECHR additionally form part of the general principles³¹. For example, the Court of Justice has confirmed that EC law recognizes the right to human dignity as part of the general principles. This right may particularly have an effect in asylum cases as regards conditions in detention or accommodation and reception conditions.

3.2 The way the Community legal order affects the ECHR

Article 307 TEC explicitly states that the provisions of the EC Treaty do not affect certain anterior agreements. The ECJ clarified what is to be understood by ‘agreements’ when it held that:

“Art. 307 TEC is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting application of the Treaty³²”.

Thus – and in accordance with the basic international law rule *pacta sunt servanda* – it may be concluded that the Community legal order has no direct effect on the ECHR. However, the vertical shift of power from the national level to the supranational level of the EU may affect the ECHR indirectly, as EC legislation has a

²⁹ ECJ Joined cases C-20/00 and C-64/00 *Booker Aquaculture* (2003) ECR I-7411, paragraph 68.

³⁰ Whilst art. 6 ECHR has no application to immigration and asylum proceedings, the ECJ recognised that the right to a fair trial applies wherever there is a link to a right conferred by Community law. The implication is that asylum proceedings linked to EC legislation are covered by the right to a fair trial and an effective remedy; S. Peers, “Human Rights in the EU legal Order: Practical Relevance for EC Immigration and Asylum Law”, in S. Peers et al. *EU Immigration and Asylum Law Text & Commentary*, 2006, p. 121.

³¹ S. Peers, *Ibid* note 30 above, p. 120.

³² ECJ C-84/98, *Commission v Portugal*, (2000), ECR I-5215, paragraph 52.

very profound and clear impact on national law. This impact on national law has a clear effect on the ECtHR and its jurisprudence. In a number of cases, the Strasbourg court has had to decide on complaints about acts by Member States conditioned by Community law. The involved Member States stated that they could not be held responsible for acts of Community institutions.

Previous ECtHR rulings such as *Matthews v UK*³³ and *Waite and Kennedy*³⁴ indicate that by attributing the competence to legislate on asylum to the Community, the Member States are not absolved from their responsibility under the ECHR³⁵. In *Matthews v UK* the ECtHR made clear that the UK remained liable under the Convention in respect to subsequent treaty commitments. The UK was held responsible for EU treaty obligations excluding Gibraltar residents from election to the European Parliament. It found a breach of art. 3 Protocol 1 and by doing so confirmed its jurisdiction *ratione materiae*³⁶. In *Waite and Kennedy* the ECtHR examined whether states could exclude access to their national jurisdictions by granting immunity to international organizations³⁷. It held that the ECHR does not prohibit the transfer of power to international organizations, but added that such transfer would not automatically absolve the states from their responsibility under the Convention. Particularly interesting for asylum law, is the ECtHR's admissibility decision in *T.I. v UK*³⁸ concerning the decision by the UK to remove an asylum seeker to Germany. T.I. argued that his removal would be in breach of art. 3 ECHR, as it was likely for Germany to expel him to Sri Lanka where he would suffer inhuman or degrading treatment or torture. The UK relied on the Dublin Convention from which it follows that Germany would examine the case and subsequently had certainty that

³³ ECtHR *Matthews v UK*, 18 February 1999, Appl. No. 24833/94.

³⁴ ECtHR *Waite and Kennedy v Germany*, Judgment of 18 February 1999, Appl. No. 26083/94.

³⁵ In *Waite and Kennedy* the ECtHR held the following: "The Court is of the opinion that where states establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity by such attribution"; ECtHR *Waite and Kennedy v Germany*, Judgment of 18 February 1999, Appl. No. 26083/94, paragraph 67.

³⁶ Costa, "The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice", Speech at King's College London, October 2008, p. 5.

³⁷ Ibid note 36 above, p. 5.

³⁸ ECtHR *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98.

the prohibition of refoulement ex art. 3 ECHR would be observed. The ECtHR held that the Convention “does not prohibit the transfer of State competences to international organizations”. However, the Court simultaneously stressed that:

“Any such transfer would not automatically absolve the States from their responsibility under the Convention with regard to the exercise of the transferred competences”³⁹.

In *Bosphorus v Ireland*⁴⁰, the EctHR has ruled, however, that the transfer of power does influence the extent of Member States responsibility under the Convention⁴¹, specifically the extent to which states may be held responsible for alleged breaches of human rights when implementing EC law⁴². The facts of the case were as follows: Bosphorus had leased an airplane from Yugoslav Airlines. Following an escalating war in Yugoslavia, the UN Security Council issued a Resolution which entailed sanctions against Yugoslavia. EC Regulation 990/93 implemented this Resolution under which the aircraft was seized during maintenance in Ireland. Bosphorus brought a complaint in Strasbourg that his right to property protected under art. 1 Protocol No. 1 had been violated by the impoundment. The Court decided that an interference with the peaceful enjoyment of one’s possessions had taken place, but held that the interference was not the result of an exercise of discretion but amounted to compliance with legal obligations flowing from EC law⁴³. It then carefully surveyed the human rights system for protection of human rights in the European Union and reviewed both the opinion of the AG and the decision of the ECJ itself. It found that the EU system for protection of human rights was equivalent both substantively and procedurally. By equivalent protection, the Court stated that it means comparable rather than identical system of protection⁴⁴. It further stated that:

³⁹ See also ECtHR, *Waite and Kennedy v Germany*, Judgment of 18 February 1999, Appl. No. 26083/94, paragraph 67.

⁴⁰ ECtHR *Bosphorus Hava Yollari Turizm v Ireland*, Judgment of 30 June 2005, Appl. No. 45036/98.

⁴¹ H. Battjes, *European Asylum Law and International Law*, Boston/Leiden: Nijhoff, 2006, p 72.

⁴² R. Lawson, Case note on *Bosphorus Airways v Ireland*, judgment of 30 June 2005 Application no. 45036/98, Contribution for Irish Human Rights Law Review.

⁴³ ECtHR, *Bosphorus Hava Yollari Turizm v Ireland*, Judgment of 30 June 2005, Appl. No. 45036/98, paragraph 148.

⁴⁴ E. Defeis, “Dual System of Human Rights: the European Union”, 2007-2008, *ILSA International and Comparative Law*, Vol. 14, p. 8.

“The Court has recognized that absolving Contracting States completely from their Convention responsibility in the areas covered by such transfer would be incompatible with the purpose and object of the Convention”.

By stating that the contracting parties are not *completely* absolved from their responsibilities under the Convention, the implication is that they may be *partially* absolved⁴⁵. This partial responsibility is conditional to the Community providing human rights protection that is ‘equivalent’ to that under the Convention, and rebuttable on a case-by-case basis if human rights protection was ‘manifestly deficient’ in the particular circumstances of the case. The ECtHR thus remains the final arbiter of the ‘equivalent protection’ and ‘manifest deficiency’ test.

3.3 Conclusions

Although the Community is formally not bound by the ECHR, in practice the ECHR is indirectly applied through application of the general principles of Community law. Consequently, the Community has to take into account both the ECHR as well as Strasbourg jurisprudence. The EC Treaty cannot alter the scope or content of obligations under the ECHR directly. However, the *Bosphorus* case indicates that Member States may only be held partially responsible for a breach of obligations of an ECHR right in situations that EC law does not leave the Member State with any discretion. Thus, in theory the Community legal order may affect the ECHR indirectly. The consequences of the *Bosphorus* ruling, i.e. whether it applies to asylum cases, and the extent of Member State responsibility under the Convention are yet uncertain and will be discussed in more detail in Chapter 7. For sure, however, it can be safely concluded that in the area of asylum, EU Member States may be held accountable for their acts under both the EC Treaty as well as the ECHR.

⁴⁵ H. Battjes, *European Asylum Law and International Law*, Boston/Leiden: Nijhoff 2006, p 73.

4. Non-Refoulement under the ECHR and Subsidiary Protection in the Community Legal Order

4.1 Defining Complementary Protection

In principle, states have a sovereign right to control the entry and removal of foreigners⁴⁶. However, this sovereign right is conditioned by international human rights law, such as the Refugee Convention, the Convention Against Torture (CAT), and other human rights treaties, notably the ECHR. Under the Refugee Convention, signatory states have to provide international protection when the individual concerned qualifies as a ‘refugee’ within the meaning of art. 1A(2) of the Refugee Convention:

“the term refugee shall apply to any person who (...) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside of the country of former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

This definition of a refugee has, however, received much criticism. Van Dijk has held that the refugee definition in the 1951 Convention “almost completely excludes the violation of economic and social rights from the concept of persecution⁴⁷”. According to Gallagher, “these restrictive definitional efforts were motivated to keep the numbers down”⁴⁸. Such critique implies that the 1951 Convention does not cover all persons seeking protection⁴⁹. UNHCR initiated debates concerning ‘protection gaps’

⁴⁶ K. Rohl, “Fleeing Violence and Poverty: Non-Refoulement Obligations under the European Convention of Human Rights, UNHCR New Issues in Refugee Research, Working Paper No. 111, 2005, p. 7. See also ECtHR, *X v Sweden*, Decision of 6 July 1977, No. 6094/73.

⁴⁷ P. van Dijk, “Article 3 ECHR and Asylum Law and Policy in the Netherlands”, in Lawson (ed), *the Dynamics of the Protection of Human Rights in Europe*, 1994, p. 150.

⁴⁸ D. Gallagher, “The evolution of the International Refugee System”, *International Migration Review*, vol. 23 no. 3, 1989, p. 581.

⁴⁹ J. McAdam, “The EU Qualification Directive: the Creation of a Subsidiary Protection Regime”, *International Journal of Refugee Law*, 2005, vol. 17, p. 461.

and emphasized the need to supplement the Geneva Convention⁵⁰. States have acknowledged this need and permission to stay can be granted to individuals, other than those who qualify as Convention refugees, upon the basis of an ‘international protection need’ which flows from States’ *non-refoulement* obligations under international or regional human rights law⁵¹. Refoulement means “removal of an alien to a state where he runs a certain risk of being submitted to certain human rights violations”⁵². The prohibition of refoulement constitutes a form of complementary protection covering a wider category of ‘refugees’ beyond the 1951 definition. McAdam states that complementary protection describes “the role of human rights law in broadening the categories of persons to whom international protection is owed beyond article 1A(2) of the Refugee Convention”⁵³. The importance and necessity for complementary protection is illustrated by the large number of individuals seeking asylum who do not qualify for refugee status and a large number of countries outside the EU have indeed codified complementary protection⁵⁴.

4.2 Non-Refoulement Obligations under the ECHR

Prior to the introduction of the Qualification Directive there was no specific international law on complementary protection. Despite the lack of formal codification, EU Member States complied with the implicit art. 3 ECHR non-refoulement obligation developed by the Strasbourg court in its jurisprudence. According to now firmly established case law:

“The removal of an individual by a state party to any country may give rise to an issue under art. 3 ECHR “where substantial grounds have been shown for believing that the individual

⁵⁰ J. Vedsted-Hansen, “Assesment of the proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the Perspective of International Law”, in D. Bouteillet-Paquet, *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* Bruylant: Brussels, 2002, p. 59.

⁵¹ J. McAdam, “Seeking Refuge in Human Rights? Qualifying for Subsidiary Protection in the European Union”, Forced Migration Online: <http://www.forcedmigration.org/events/prague2004/mcadam-paper.pdf>, at 23 August 2005, p. 2.

⁵² H. Battjes, *European Asylum Law and International Law*, Boston/Leiden: Nijhoff 2006, p.

⁵³ J. McAdam, Ibid note 51 above, p. 2.

⁵⁴ The Organization of African Unity has agreed upon the Convention Governing the Specific Aspects of the Refugee Problems in Africa (1969); Latin American countries have adopted the Cartagena Declaration on Refugees (1984).

concerned, if removed, would face a real risk of being subjected to treatment contrary to art. 3 ECHR”⁵⁵.

The first case in which the ECtHR had to decide whether deportation would engage the responsibility of the deporting state is *Soering*⁵⁶. This case concerned an extradition request by the United States of America to the United Kingdom. The ECtHR held the following:

“The decision by a Contracting State to extradite a fugitive may give rise to an issue under art. 3, and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. (...) In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment”⁵⁷.

Subsequently, *Cruz Varas and Others v Sweden* involved the expulsion of asylum-seekers in which the ECtHR referred to the *Soering* case and held that the same principles with regard to extradition apply to expulsion cases. The responsibility of a state party is thus engaged because of the act of removal thereby exposing the individual to the risk of treatment contrary to art. 3 ECHR. As has stated:

“The reasoning behind it is based on the idea that a state is violating art. 3 if its act of removal constitutes a crucial link in the chain of events leading to torture or inhuman treatment or punishment”⁵⁸.

Through the prohibition of refoulement the individual concerned is granted protected status, preventing him from being forced to return to a territory where he may be at risk or in danger of serious harm⁵⁹.

⁵⁵ P. van Dijk, *Theory and Practice of the European Convention on Human Rights*, Antwerpen: Intersentia, 2006, p. 427.

⁵⁶ ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88.

⁵⁷ ECtHR *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, paragraph. 91.

⁵⁸ B. Vermeulen, “Freedom from Torture and Other inhuman or Degrading Treatment and Punishment, in P. van Dijk et al. *Theory and Practice of the European Convention on Human Rights*, Antwerpen: Intersentia, 2006.

4.3 Subsidiary Protection under Community Law

In the Qualification Directive complementary protection is termed ‘subsidiary protection’. The Directive seeks to “clarify and codify existing international and Community obligations and practice”, and specifies the rights and status to which beneficiaries of subsidiary protection are entitled to⁶⁰.

It is the first supranational legal instrument that defines who is a refugee and who is ‘otherwise in need of international protection’, meaning complementary or subsidiary protection. The Directive provides protection for refugees within the meaning of the Geneva Convention, and for persons who, despite not qualifying as a refugee within the meaning of the Geneva Convention, nevertheless need protection against forced removal or the refusal of entry. Refugees and individuals who qualify for subsidiary protection are granted benefits, such as, a temporary residence permit, travel documents, access to employment, education and health care. A refugee is however granted more extensive rights than someone who qualifies for subsidiary protection. Subsidiary protection is only applicable to a person “who does not qualify as a refugee”. Art. 18 holds that:

“Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection”.

Art. 2(e) of the Qualification Directive defines a “person eligible for subsidiary protection” as:

“a third country national or a stateless person who does not qualify as a refugee but in respect of whom *substantial grounds have been shown for believing that the person concerned, if returned to his or her country of former habitual residence, would face a real risk of suffering serious harm* as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.

⁵⁹ K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia 2009, p. 24.

⁶⁰ J. McAdam, “The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime” *International Refugee Journal*, 2005, Volume 17, p. 466.

4.4 Conclusions

The refugee definition in the 1951 Convention does not cover all persons seeking protection. EU Member States have filled this protection gap with complementary protection following Strasbourg jurisprudence. Specifically, under art. 3 ECHR the Member States are prohibited to remove an individual where substantial grounds have been shown that upon return he will suffer treatment contrary to art. 3. This implicit obligation is called the prohibition from refoulement. The prohibition of refoulement is however not codified in legislation under the ECHR. In contrast, this has been done in the Qualification Directive. In this Directive complementary protection is termed subsidiary protection. By definition, subsidiary protection is only applicable to a person “who does not qualify as a refugee”. By and large the Qualification Directive codifies the jurisprudence on complementary protection under art. 3 ECHR.

5. Factors Determining Complementary/Subsidiary Protection

The object of prohibition on refoulement is to prevent human rights violations. The right is conditional upon the absence of national protection and the scope of a state's obligation is determined primarily by (a) the nature and the degree of harm that the individual may be subjected to, and by (b) the probability that subjection to harm will occur⁶¹. Other factors which may reflect on the obligations concern possible exceptions to the obligation, e.g. whether the prohibition is considered absolute or non-absolute. In this section these conditional requirements and character of the obligation will be discussed, differentiated for prohibition on refoulement under the ECHR and subsidiary protection under the Qualification Directive in the Community legal order.

5.1 Conditional Elements: Type and Probability of Harm

5.1.1 Prohibition of Refoulement with regard to the nature of Harm Under art.3 ECHR

According to established jurisprudence of the ECtHR, states must not expel, extradite, or deport an individual who would face torture or inhuman or degrading treatment or punishment. Expulsion or extradition only raises an issue if the possible treatment attains a minimum level of severity as to bring it within the scope of this provision⁶². The assessment of this minimum is relative: it depends on all circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration and its physical or mental effects⁶³. Such allegations must be supported by appropriate evidence⁶⁴. While the definition of torture has been fairly

⁶¹ K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia 2009, p. 26.

⁶² K. Rohl, "Fleeing violence and poverty: non-refoulement obligations under the European Convention of Human Rights" new issues in refugee Research, working paper no. 111, January 2005, p. 15.

⁶³ ECtHR, *Vilvarajah v United Kingdom*, Judgment of 30 October 1991, Appl. 13163/87, paragraph 107; ECtHR, *Hussain v United Kingdom*, Judgment of 7 March 2006, Appl. No. 8866/04, paragraph 53; ECtHR *Weeks v United Kingdom*, Judgment of 5 October 1988, Appl. No. 9787/82, paragraph. 47.

⁶⁴ ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99, paragraph. 70.

clear⁶⁵, the term inhuman or degrading treatment seems less clear and as time elapsed qualifications have evolved. In *Selmouni* the ECtHR clarified that:

“Certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in the future⁶⁶”

This indicates that certain acts currently falling outside the scope of art. 3 might in the future fall within the required level of severity⁶⁷.

Only in few cases, concerning the prohibition of non-refoulement, has the ECtHR explicitly reviewed specific conduct which may await the applicant. The Strasbourg court has considered that circumstances relating to a death sentence⁶⁸, the imposition of an irreducible life sentence without possibility of early release⁶⁹, expulsion to a country where there is an officially recognized regime of slavery⁷⁰, stoning to death⁷¹, and public execution of corporal punishment⁷², constitute treatment contrary to art. 3 ECHR.

Aforementioned treatment is clearly against fundamental values enshrined in art. 3 ECHR. In principle the same standards should apply for treatment to fall within the scope of art. 3 ECHR in situations of refoulement⁷³. In this respect, the Court’s jurisprudence has created considerable confusion about the scope of application of art. 3 ECHR. It has been argued that consistent application of art. 3 ECHR in respect of

⁶⁵ See inter alia, ECtHR, *Aksoy v Turkey*, Judgment of 18 December 1996, Appl. No. 28635/95, paragraph 64 for the qualification of torture.

⁶⁶ ECtHR, *Selmouni v France*, Judgment of 1 July 1999, Appl. No. 25803/94, paragraph. 101.

⁶⁷ ECtHR, *Henaf v France*, November 2003, Appl. No. 65436/01, paragraph. 55.

⁶⁸ ECtHR, *Shamayev and 12 Others v Georgia and Russia*, Judgment of 12 April 2005, Appl. No. 36378/02.

⁶⁹ ECtHR, *Nivette v France*, Judgment of 14 December 2000, Appl. No. 44190/98 (partial admissibility decision); ECtHR, *Einhorn v France*, Judgment of 16 October 2001, Appl. No. 71555/01 (admissibility decision).

⁷⁰ ECtHR *Ould Bara v Sweden*, Judgment of 19 January 1999, Appl. No. 42367/98 (admissibility decision).

⁷¹ ECtHR, *Jabari v Turkey*, Judgment of 11 July 2000, Appl. No. 40035/98, paragraphs 34 and 41.

⁷² ECtHR, *D. and Others v Turkey*, Judgment of 22 June 2006, Appl. No. 24245/03, paragraph. 50.

⁷³ See ECtHR, *Mamatkulov and Askarov v Turkey*, Judgment of 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), para. 67; See also for a discussion on this issue K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia, 2009, p. 242-243.

the cases *Yankov v Bulgaria*⁷⁴ and *Moisejevs v Latvia*⁷⁵ would mean that being shaved bald or receiving a light meal would in certain circumstances mean that individuals cannot be expelled⁷⁶. In these circumstances, it may be questioned whether the concept of degrading treatment has perhaps been stretched too far⁷⁷.

5.1.2 Prohibition of Refoulement with regard to the nature of Harm under the Qualification Directive

Art. 15 relates to the nature of suffering which may result in subsidiary protection being granted⁷⁸. The wording of this provision closely reflects the wording of art. 3 ECHR and sets out the content of subsidiary protection by listing the human rights grounds that may give rise to subsidiary protection status:

- (a) Death penalty or execution; or
- (b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Art. 15 (a) is based on the 6th and 13th Protocol of the ECHR and is also consistent with Strasbourg jurisprudence, in particular *Soering v UK*⁷⁹. The ECtHR held in this case that although the death penalty itself did not raise an issue under articles 2 and 3 ECHR, circumstances relating to the death sentence, better known as the death row phenomenon, could give rise to an issue under art. 3 ECHR⁸⁰. Article 15 (b) is furthermore almost an exact copy of the wording of art. 3 ECHR. The only difference between these two provisions is the criterion 'in the country of origin'. The wording seems to restrict the scope of ill-treatment to treatment incurred by an applicant 'in his

⁷⁴ ECtHR, *Yankov v Bulgaria*, Judgment of 11 December 2003, Appl. No. 39084/97.

⁷⁵ ECtHR, *Moisejevs v Latvia*, Judgment of 15 June 2006, Appl. No. 64846/01.

⁷⁶ K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia, 2009, p. 243, referring to R. Lawson and L. Verhey, 2006.

⁷⁷ K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia 2009, p. 243.

⁷⁸ J. McAdam, "Seeking Refuge in Human Rights? Qualifying for Subsidiary Protection in the European Union", *Forced Migration Online*, 2004, p. 11.

⁷⁹ ECtHR, *Soering v United Kingdom*, Judgment of 7 July 1989, Appl. No. 14038/88.

⁸⁰ ECtHR, *Soering v United Kingdom*, Judgment of 7 July 1989, Appl. No. 14038/8, paragraph 88.

or her country of origin'⁸¹. Battjes has argued that this requirement excludes some 'humanitarian grounds' cases of ill-treatment from the scope of subsidiary protection⁸². Reference can be made to *D v UK*⁸³ concerning a convicted drug trafficker who suffered from AIDS and was to be expelled to his country of origin Kitts and Nevis. Since he could not enjoy the same level of treatment as in the UK, the ECtHR hence accepted that in these 'very exceptional circumstances', the expulsion would amount to ill-treatment. The Strasbourg court held that the combined effect of exposure to suffering in the receiving country, and withdrawal of care as a result of expulsion, amounted to ill-treatment⁸⁴. Under the Qualification Directive, however, pursuant to the criterion that the ill-treatment needs to occur 'in' the country of origin, EU Member States cannot incur the type of liability as accepted by the ECtHR in *D v UK*. Apart from this difference subsidiary protection of art. 15 (a) and (b) taken together constitute what has been called a 'quasi ECHR protection framework'⁸⁵.

Art. 15 (c) creates an additional ground for subsidiary protection by referring to situations of indiscriminate violence. In contrast to art. 15 (a) and (b), more criteria have to be met as there has to be a 'serious threat to a life or person'; this threat further has to be 'individual'; the person must be a 'civilian'; and the threat must be due to 'indiscriminate violence in a situation of international or armed conflict'.

⁸¹ H. Battjes, *European Asylum Law and International Law*, Boston/Leiden: Nijhoff 2006, p.

235.

⁸² H. Battjes, *European Asylum Law and International Law*, Boston/Leiden: Nijhoff 2006, p.

237.

⁸³ ECtHR, *D v United Kingdom*, Judgment of 2 May 1997, Appl. No. 30240/96.

⁸⁴ H. Battjes, *European Asylum Law and International Law*, Boston/Leiden: Nijhoff 2006, p.

236.

⁸⁵ H. Storey, "EU Refugee Qualification Directive: A Brave New World?" *International Journal of Refugee Law*, 2008, vol. 20, p. 14.

5.2 Prohibition on Refoulement with regard to the probability that harm may occur

5.2.1 Prohibition on Refoulement with regard to the probability that harm may occur under art.3 ECHR

Since the nature of a state's responsibility 'lies in the act of exposing an individual to the risk of ill-treatment'⁸⁶, a key factor in determining the extent of non-refoulement under art. 3 is the existence of a 'real risk' of ill-treatment⁸⁷. According to the ECtHR, an individual may be granted protection from refoulement where:

'substantial grounds have been shown for believing that he faces a risk of being subjected to torture or to inhuman or degrading treatment or punishment after removal to another state'⁸⁸.

Thus, a credible claim containing sufficient facts and circumstances must be presented in order to establish that a real risk exists⁸⁹. The ECtHR stated in *Cruz Varas* that the 'real risk' criterion needs to be assessed at the time of the final court proceedings⁹⁰. It is the probability at that moment which invokes the responsibility of the expelling state, not the actual occurrence of an art. 3 violation after expulsion⁹¹.

The real risk criterion has been defined by the ECtHR in its case-law. The requirement of 'real' clarifies that risks must not be fanciful, implausible or 'tenuous'⁹². In both *Soering* and *Cruz Varas*, this risk was defined as a 'real, personal, and foreseeable' risk. In *Vilvarajah and Others*, however, the ECtHR applied a more restrictive test. The case concerned the expulsion of five Sri Lanka citizens of Tamil ethnic origin back to Sri Lanka where a civil war raged. The British government argued that the individual circumstances of the asylum-seekers in addition to the

⁸⁶ K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia, 2009, p. 246, referring to ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, appl. No. 15576/89, paragraph 76.

⁸⁷ K. Rohl, "Fleeing Violence and Poverty: non-refoulement obligations under the European Convention of Human Rights", UNHCR Working Paper no. 11, 2005, p 17.

⁸⁸ ECtHR, *Soering v United Kingdom*, 7 July 1989, appl. No. 14038/88, paragraph 91.

⁸⁹ K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia, 2009, p. 246.

⁹⁰ ECtHR, *Cruz Varas and Others v Sweden*, Judgment of 20 March 1991, Appl. No. 15576/89, paragraph 67.

⁹¹ K. Rohl, "Fleeing Violence and Poverty: non-refoulement obligations under the European Convention of Human Rights", UNHCR Working Paper no. 11, 2005, p. 18.

⁹² ECtHR, *F v United Kingdom*, Judgment of 22 June 2004, Appl. No. 17341/03.

general situation in Sri Lanka were not sufficient to establish a ‘well-founded’ fear. The ECtHR held that:

“The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. Since the situation was still unsettled, there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants. A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of art. 3. It is claimed that the second, third, and fourth applicants were in fact subjected to ill-treatment following their return. Be that as it may, however, there existed no *special distinguishing features* in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way”⁹³.

These two paragraphs indicate that, in the absence of special distinguishing features, there was merely a general risk that the asylum-seekers would be treated in a manner inconsistent with art. 3 ECHR. Such a general risk was, however, in itself not sufficient to qualify as a ‘real risk’ so as to bring their removal within the scope of art. 3.

In contrast, however, in more recent cases such as *Salah Sheekh v the Netherlands*⁹⁴ and *NA v United Kingdom*⁹⁵ the ECtHR adopted a more liberal approach. *Salah Sheekh v the Netherlands* concerned an applicant from Somalia belonging to the Ashraf minority population. The ECtHR stated that because the group was targeted, they would remain vulnerable to human right violations. In the context of this case the ECtHR held that:

⁹³ ECtHR, *Vilvarajah v United Kingdom*, 30 October 1991, Appl. No. 13163/87, paragraphs 111 and 112.

⁹⁴ ECtHR, *Salah Sheekh v the Netherlands*, 11 January 2007, Appl. No. 1948/04.

⁹⁵ ECtHR, *NA v United Kingdom*, 17 July 2008, appl. No. 25904/07.

“It cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk”⁹⁶.

The conclusion that mere membership of a group which is systematically exposed to a practice of ill-treatment can amount to a real risk was later confirmed by the ECtHR in *NA v the United Kingdom*. In this case the ECtHR went one step further when it accepted that a real risk may be established in a general situation of extreme violence. The court, after a detailed analysis of its own case-law pertaining to situations of general violence, stated the following:

“The Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach art. 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return”⁹⁷.

5.2.2 *Probability that Harm May Occur Under the Qualification Directive*

The standard of proof for subsidiary protection is ‘substantial grounds for believing’⁹⁸. The reference to substantial grounds stems directly from Strasbourg jurisprudence and appears to have been deliberately selected so as to prevent divergence between international and Member States practice⁹⁹. The Directive thus requires that there are “substantial grounds for believing that”, and Art. 2 (e) further requires this risk to be ‘real’. This criterion is in line with case-law of the ECtHR and secures compliance with art. 3 ECHR. Contrary to Strasbourg jurisprudence, there is not yet clear case-law clarifying this criterion, nor does the Qualification Directive elaborate further on this standard.

⁹⁶ ECtHR, *Salah Sheekh v the Netherlands*, 11 January 2007, Appl. No. 1948/04, paragraph 148.

⁹⁷ ECtHR, *NA v United Kingdom*, 17 July 2008, appl. No. 25904/07, paragraph 115.

⁹⁸ Article 2 (e) Qualification Directive.

⁹⁹ J. McAdam, “Seeking Refuge in Human Rights? Qualifying for Subsidiary Protection in the European Union”, *Forced Migration Online*, June 2004, p. 10.

Divergent views are apparent on the more strict criteria for application of art. 15 (c), particularly on how to interpret threats resulting from ‘indiscriminate violence’. In this respect, UNHCR has encouraged Member States to broadly apply this provision without “excessive reliance on limitations relating to individual threat”¹⁰⁰. During negotiations the scope of art. 15 (c) was significantly narrowed. The provisions originally included systematic and generalized violations¹⁰¹. Terminology finally adopted, however, is not entirely clear and leaves much room for interpretation¹⁰². Nevertheless, some academic commentators have stated that Art. 15 (c) seems broader in scope than art. 3 ECHR. Whereas the ECtHR held in *Vilvarajah v UK* that civil war and situations of armed conflict are not enough to fall within the scope of art. 3 ECHR, it is argued that art 15 (c) is to be applied where civilians in situations of armed conflict are seriously threatened by indiscriminate violence. Battjes has argued that in contrast to art. 15 (a) and (b) which require substantial grounds for believing that a person would face a real risk of the relevant ill-treatment, art. 15 (c) requires only that such a person would face a *threat* of the relevant ill-treatment¹⁰³. Strikingly, however, Recital 26, which was inserted in the Preamble to the Directive at the insistence of some Member States, stipulates the following:

“Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.”

From this it would seem to follow that the threat must amount to a ‘serious and individual threat’ which appears to require that an applicant shows he or she has been ‘singled out’ in order for proscribed treatment to qualify as ‘serious harm’. McAdam emphasizes that this would be problematic since indiscriminate violence is by

¹⁰⁰ M. Garlick, “UNHCR and the Implementation of the Qualification Directive”, in K. Zwaan (ed.), *the Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen, 2007, p. 63.

¹⁰¹ UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence, 2008, p. 4.

¹⁰² UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence, 2008, p. 4.

¹⁰³ H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Nijhoff Publishers, 2006, p. 239-40.

definition random and haphazard¹⁰⁴. Whilst the Recital stipulates that widely shared risks do not ‘normally’ create an individual threat, it leaves open the possibility that in certain exceptional circumstances they may ‘abnormally’ create such a risk. Such an interpretation is in line with recent ECtHR case-law, in particular *NA v the United Kingdom*. In this case the ECtHR accepted that a real risk existed in a general situation of extreme violence whilst emphasizing that it would only accept such an approach in the most extreme cases of general violence¹⁰⁵. Indeed, in the recent *Elgafaji*¹⁰⁶ ruling the ECJ has also accepted that a real and individual risk may exist in a general situation of indiscriminate violence. This will be more extensively elaborated upon in the case-study under Chapter 5.

5.3 The Character of non-refoulement under art.3 ECHR and the Qualification Directive

5.3.1 The Absolute Character of non-refoulement under art. 3 ECHR

Article 3 ECHR is formulated in such a way that it does not allow for any exceptions, not for reasons of public interest nor for national security. Moreover, no derogations from this provision are allowed in times of war or for reasons of public emergency. The ECtHR has recently recalled the absolute nature of art. 3 ECHR in *Saadi v Italy*¹⁰⁷. This case concerned a Tunisian citizen residing in Italy where he was convicted for forgery and conspiracy and was furthermore suspected of involvement with terrorist activities. When released from prison, he was to be expelled to Tunisia. Saadi complained that enforcement of his deportation would expose him to the risk of treatment contrary to art. 3 ECHR. In its ruling the ECtHR noted that “states face immense difficulties in protecting the communities from terrorist violence,” this however, “must not call into question the absolute nature of article 3”.

The ECtHR further reaffirmed that:

¹⁰⁴ Mc Adam, “The Qualification Directive: an Overview”, in K. Zwaan (ed.), *the Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Wolf Legal Publishers Nijmegen, 2007, p. 21.

¹⁰⁵ ECtHR, *NA v United Kingdom*, Judgment of 17 July 2008, appl. No. 25904/07, para. 115.

¹⁰⁶ ECJ C-465/07, *Elgafaji v Staatssecretaris v Justitie*, 17 February 2009.

¹⁰⁷ ECtHR, *Saadi v Italy*, Judgment of 28 February 2008, Appl. No. 37201/06.

“it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a state is engaged under art. 3 [...] In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account”¹⁰⁸.

5.3.2 *The non-absolute character of the Prohibition under the Qualification Directive*

The prohibition of refoulement is explicitly codified in the Qualification Directive. Art. 21 of the Qualification Directive provides that:

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.
2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoul a refugee, whether formally recognized or not, when
 - (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
 - (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

This article first reaffirms the obligation of Member States to respect the principle of non-refoulement, but then states an exception to the rule. Consequently, the scope of persons entitled to protection under the prohibitions of non-refoulement ex art. 3 ECHR does not coincide with the scope of persons entitled to subsidiary protection as laid down in the Qualification Directive. The exclusion provision stands in direct contrast with the absolute character of art. 3 ECHR, demonstrated in various Court judgments such as *Soering v UK* and *Ireland v UK* where the ECtHR held:

“it follows that the prohibition under Article 3 of the Convention is an absolute one and that there can never be under the Convention, or under international law, a justification for acts in breach of that provision”¹⁰⁹.

As a result, many academics have highlighted the ‘troublesome’ exclusion provision of the Qualification Directive. For example, Garlick emphasizes the undefined and

¹⁰⁸ ECtHR, *Saadi v. Italy*, Judgment of 28 February 2008, Appl. No. 37201/06, paragraph 138.

¹⁰⁹ Report of 25 January 1976, *Ireland v United Kingdom*, B.23-I (1980), p. 390.

unclear notion of a ‘particularly serious crime’ and argues that such broad definition creates great scope for subjective and arbitrary application of the exclusion concept¹¹⁰. Gil-Bazo has more vehemently expressed her critique when suggesting that this exclusion clause constitutes a “de facto provision on exclusion, which arguably falls short of existing and evolving international law standards”¹¹¹. She moreover disputes the compatibility of the exclusion clause with the concept of minimum standards in art. 63 TEC, particularly as to whether those minimum standards may be below those established by international refugee and human rights law¹¹².

The provision is indeed in complete contrast with the evolution of international human rights law, particularly with art. 3 ECHR. It should be noted that the Commission’s proposal was adopted a day after 9/11 and was therefore negotiated under the climate that followed the attacks in the US the previous day¹¹³. This may explain the desire of Member States to retain discretion in security cases. The exclusion provisions, however, remain subject to the scrutiny of national courts and the ECJ. Moreover, discretion is conferred on Member States to introduce more favorable rules to grant protection to excludable individuals whom the Member States are not allowed to remove under the ECHR¹¹⁴.

Nevertheless, it is conceivable that the ECJ be called upon to assess the legality of the exclusion clauses by reference to international human rights, as general principles of Community law. Taking into account the Commission’s Green Paper on ‘return’ of third country nationals of international protection in which it asserted that refugees and other persons in need of international protection could be removed if there were public order grounds, it is to be expected that the ECJ accepts security grounds for

¹¹⁰ M. Garlick, “UNHCR and the implementation of Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as persons who Otherwise Need International Protection and the Content of the Protection Granted (The EC ‘Qualification Directive’”, in K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Wolf Legal Publishers, Nijmegen, 2007, p. 66.

¹¹¹ M. Gil-Bazo, “Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum under EC Law”, UNHCR Research Paper No. 136, November 2006, p. 15.

¹¹² M. Gil-Bazo, “Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum under EC Law”, UNHCR Research Paper No. 136, November 2006, at p. 18.

¹¹³ M. Gil-Bazo, “Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum under EC Law”, UNHCR Research Paper No. 136, November 2006, at p. 14.

¹¹⁴ Art. 4 Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as persons who Otherwise Need International Protection and the Content of the Protection Granted Qualification Directive.

exclusion. It would thereby depart from the interpretation of the ECtHR and other international human rights monitoring bodies in relation to non derogable rights. In this case, a conflict of obligations would arise for Member States as they remain bound by the ECHR.

5.4 Conclusions

Conditional elements for the prohibition from refoulement include:

- a. The nature and degree of harm that the individual may be subjected to
- b. The probability that subjection to harm will occur

There is much overlap and similarity between the definitions for these elements used in the jurisprudence of ECtHR and in the Qualification Directive. Under the ECHR treatment (harm) must attain a certain level of severity and case law provides guidelines for interpretation. With regard to the probability, the ECHR requires “substantial grounds for believing that a real risk exists”. In the Qualification Directive art. 15 pertaining to harm is largely based upon the ECHR, but also includes an additional element described under 15 (c) pertained to situation of general violence. With regard to probability the definition is similar, but with the addition that the risk should be present in the country of origin, thus excluding humanitarian cases. A major difference between the two regimes is that non-refoulement under art. 3 ECHR carries an absolute character whilst the prohibition of refoulement under the QD is non-absolute and grounds are recognized for exceptions to the obligation. This chapter sets the stage for the critical discussion on similarities and differences presented in Chapter 7.

6. Case Study on C-465/07 *Elgafaji v Staatssecretaris van Justitie*

The first and up until now only case ruled upon by the ECJ following the introduction of the Qualification Directive concerns the *Elgafaji* ruling. This case is illustrative for the complexity of the current European legal framework with regard to subsidiary protection. The case also constitutes a prime example of how sensitive the realm of asylum related human rights law is. The ECJ's preliminary reference caused for substantial turmoil within Dutch politics. Political parties, such as the VVD and PVV said to have "great concerns" with regard to the ECJ's judgment¹¹⁵. Moreover, speculations circled as to whether the *Elgafaji* judgment coerced the Netherlands to adopt a more liberal asylum policy.

6.1 The Facts

Elgafaji is an Iraqi national who fled, with his wife, to the Netherlands. In Iraq he worked for a British Security firm. His uncle worked for the same firm and had been killed by militia who posted a life threatening letter on Mr. *Elgafaji*'s door titled "death to collaborators", thus warning Mr. *Elgafaji* of a similar fate¹¹⁶. After having fled to the Netherlands, Mr. and Mrs. *Elgafaji* applied for a temporary residence permit.

The *Elgafaji*'s argued that they would run a real risk if they were to be expelled to Iraq. In support of their arguments they relied on facts which were individual to their case. The State Secretary relied on art. 29 (1) (b) of the Netherlands Law on Aliens 2000, derived from art. 3 ECHR, under which no one shall be subjected to torture or to inhuman or degrading treatment or punishment and held that the documents produced had not shown that they would face a serious risk to their lives if expelled to Iraq. In particular, the absence of official documents was emphasized. Consequently, it was held that their situation did not fall within the scope of art. 29 (1) (b) Vw.

The applicants challenged this decision and relied on art. 15 (c) in conjunction with art. 2 of the Qualification Directive. Their main arguments entailed that art. 29 (1) (b)

¹¹⁵ "Europees Hof steunt asielzoekers", *Wereldomroep*, 19-02-2008

¹¹⁶ ECJ C-465/07 *Elgafaji v Staatssecretaris van Justitie*, paragraph 17 and 18.

Vw solely covered art. 15 (b) and not art. 15 (c)¹¹⁷. The State Secretary rejected this claim arguing that the standard of proof under art. 15 (b) and (c) is identical. Since the applicants could not prove a serious harm under art. 29 (1) (b) Vw, they could not reasonably rely on art. 15 (c) which requires similar proof.

The Elgafaji's consequently brought proceedings before the District Court, which annulled the order refusing to grant subsidiary protection. It held that art. 15 (c) required a lesser degree of individualization of the threat required by art. 15 (b) since art. 15 (c) covers situations of armed conflicts in the country of origin.

The District Court Decision was appealed and was brought before the Netherlands Council of State which requested a preliminary ruling from the ECJ concerning the interpretation of articles 2(e) and 15 (c) of the Qualification Directive. Essentially, the ECJ had to answer the question whether art. 15 (c) of the Qualification Directive offers similar protection to asylum-seekers as art. 3 ECHR, or whether it offers supplementary or other protection than art. 3. And if art. 15 (c) offers supplementary or other protection, what the criteria are for determining whether a person runs a real risk of being subjected to indiscriminate violence.

6.2 The Court's Judgment

The Netherlands Council of State primarily seeks guidance on how to interpret art. 15 (c), and in particular asks whether the individual must be specifically targeted by reason of factors particular to his circumstances¹¹⁸. At the outset, the ECJ notes that the content of art. 15 (c) is different from that of art. 3 ECHR, and that therefore interpretation should be carried out independently¹¹⁹. The Court reviews the system of art. 15 and holds that the types of serious harm defined in art. 15 (a) and (b) cover situations in which the individual is "specifically exposed to the risk of a particular type of harm"¹²⁰. The Court emphasizes, however, that in contrast to 15 (a) and (b), art. 15 (c) covers a more general risk of harm inherent in a general situation of international or internal armed conflict. The standard of proof under (a) and (b) thus

¹¹⁷ Opinion AG Maduro in ECJ C-465/07 *Elgafaji v Staatssecretaris v Justitie*, paragraph 11.

¹¹⁸ ECJ C-465/07, *Elgafaji v Staatssecretaris v Justitie*, 17 February 2009, paragraph 30.

¹¹⁹ ECJ C-465/07, *Elgafaji v Staatssecretaris v Justitie*, 17 February 2009, paragraph 28.

¹²⁰ ECJ C-465/07, *Elgafaji v Staatssecretaris v Justitie*, 17 February 2009, paragraph 32.

differs from (c). The ECJ then draws attention to the logic of art. 15, and states that art. 15 (c) is subject to:

“[...] a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualization.¹²¹”

The Court thus seems to say that a too broad interpretation would cover any situation of indiscriminate violence which would ignore the requirement of an individual link. The ECJ subsequently holds that:

“The more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.¹²²”

The relation between indiscriminate violence and proof of an individual link is thus interrelated. The Court briefly summarizes certain factors for the national court to take into account, such as the geographical scope of the situation of indiscriminate violence, the actual destination of the applicant in the event he or she is returned to the relevant country, and the existence, if any, of a serious indication of a real risk.

Finally, in the very last paragraph of the judgment, the ECJ adds that the interpretation given is “fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia, *NA. v. the United Kingdom*, paragraphs 115-117 and the case-law cited)¹²³”.

The Netherlands Council of State has recently delivered its judgment on May 25th 2009. Concerning the standard of proof, whilst acknowledging the instable and insecure situation in Iraq, it held that the Foreign Affairs reports did not include any information on the degree of violence in Iraq and that therefore it could not be concluded that the general situation of violence was of such an extreme nature that Mr. and Mrs. Elgafaji would be exposed to ill-treatment simply by virtue of being

¹²¹ ECJ C-465/07, *Elgafaji v Staatssecretaris v Justitie*, 17 February 2009, paragraph 38.

¹²² ECJ C-465/07, *Elgafaji v Staatssecretaris v Justitie*, 17 February 2009, paragraph 39.

¹²³ ECJ C-465/07, *Elgafaji v Staatssecretaris v Justitie*, 17 February 2009, paragraph 44.

exposed to such violence upon return¹²⁴. It further held that the individual threat had not satisfactorily been demonstrated. The evidence introduced (the fixed note on their door) would not constitute a valid ground for annulment of the State Secretary's refusal to grant temporary residence permits¹²⁵. Noteworthy is that the court neglects to take into account the ECJ's proposed sliding scale but limits its investigation to whether or not there were extreme circumstances.

6.3 Comments

The main contribution of the Elgafaji judgment is that it provides some clarification on how to interpret art. 15 (c). After the adoption of the Qualification Directive, divergent opinions existed on how to interpret the term 'individual', on the issues whether art. 15 (c) required a higher level of proof than art. 15 (a) and (b), and whether the provisions' scope was broader than that of art. 3 ECHR. The ECJ resolves these uncertainties by noting at the outset that the content of art. 15 (c) differs from that of art. 3 ECHR. It does, however, leave some questions unanswered. Uncertainties remain how exactly art. 15 (c) differs from art. 3 ECHR, and more importantly, whether art. 15 (c) provides the individual with the same or a higher level of protection. This illustrates some of the weaknesses of the judgment. It is further remarkable that the ECJ notes in the final paragraph of the judgment that its interpretation corresponds to that of the ECtHR in *NA v UK* without undertaking a more comprehensive analysis of Strasbourg jurisprudence.

In my opinion, it is a pity that the ECJ does not undertake a more elaborated comparison, setting out reasons as to how its interpretation is in line with Strasbourg case-law. Such coherent analysis would have provided its own interpretation more legitimacy. It may further be wondered what motives the ECJ had when it stressed that its approach corresponds to that of the ECtHR. Can such brief reference be characterized as deferential? Or was it motivated out of jurisdictional purposes so as to pre-empt the ECtHR from review following the *Bosphorus* case?

¹²⁴ Raad van State Elgafaji v Staatssecretaris v Justitie, 200702174/2/V2, 25 May 2009, paragraph 2.5.3.

¹²⁵ Ibid note 124 above, paragraph 2.5.2.

6.4 Conclusions

The main importance of the Elgafaji judgment is that it is the first case on the Qualification Directive referred to the ECJ and that it provides some clarification on art. 15 (c). Perhaps, however, the judgment and considerations of the ECJ raise more questions than answers. Not only do these pertain to the case itself (e.g. equivalent or different level of protection), but, in particular to conceptual and organizational issues. The strong reference of the ECJ to the ECtHR and explicit but unproven statements that the judgment corresponds to that of the ECtHR raises questions on the underlying motives. Given the negative interpretation which the Netherlands Council of State subsequently concluded from the ECJ judgment this may also be the first case to be submitted for contra-expertise to the ECtHR. Then, the relation between the two courts in the area of asylum law may become more clear.

7. Critical Discussion on Dual Protection

Comparison between non-refoulement obligations under the ECHR and subsidiary protection as laid down in the Qualification Directive is complex. Specifically, because jurisprudence of the Strasbourg Court is continuously evolving and jurisprudence on the Qualification Directive is, as yet, limited to only one case. From the discussion of Strasbourg case-law in the preceding chapter, it has become clear that the Convention may be considered a ‘living mechanism’, capable of adapting to changing times and circumstances. This has occurred in relation to the scope of treatment (harm), whilst the risk criterion has also been subject to changing interpretations as indicated by the *Vilvarajah* and the subsequent *NA v United Kingdom* judgments. Whereas in the former the Court uses the strict criterion of “special distinguishing features”, it has indicated in the latter that such individual link would not be required in situations of extreme general violence. Evolving Strasbourg jurisprudence thus complicates the undertaken comparison.

I will discuss similarities and differences between non-refoulement obligations under the ECHR and subsidiary protection under the Qualification Directive from an organizational perspective and from the perspective of the individual and finally address the consequences of dual protection.

7.1 Similarities and differences from an organizational perspective

A comparison based upon the respective legislations shows that subsidiary protection is closely modeled upon art. 3 ECHR and Strasbourg jurisprudence. The risk criterion in the Qualification Directive of ‘substantial grounds for believing’ and the requirement of a ‘real risk’ correspond to the criteria set by the Strasbourg Court in its case-law. Furthermore, Art. 15 (a) is based on the 6th and 13th Protocol of the ECHR and art. 15 (b) may be considered an exact copy of art. 3 ECHR. Art. 15 (c) covers situations of general violence, a feature which is not covered explicitly in the provisions of the ECHR. Art. 15 (c) constitutes a broad provision, which has been criticized for its unclarity and vagueness. The provision’s broadness may, however, also be praised for making allowances for future changes in the evolving field of human rights jurisprudence since the provision is subject to ECJ scrutiny.

With reference to the judgement of the ECJ on art. 15 (c) in the *Elgafaji* case I will discuss this in more detail.

Interpretation of art. 15 (c) is highly complex due to the fact that the provision includes a contradictory postulation: ‘indiscriminate violence’ and ‘individual threat’. Indiscriminate violence, by definition, means “the exercise of force not targeted at a specific object or individual¹²⁶” and is thus characterized by haphazardness. This essentially means that an applicant would have serious reasons to fear for his life simply by being present in a particular region. Hence, it would appear that an individual threat in situations of indiscriminate violence, e.g. that he or she is ‘singled out’ is misplaced. Indeed, the ECJ recognizes this apparent contradiction and states that where the degree of indiscriminate violence reaches a significantly high level, the word ‘individual’ must be understood as covering harm to civilians irrespective of their identity¹²⁷. This means that in exceptional severe circumstances, the applicant will not have to demonstrate particular individual features. By using the word ‘exceptional’ the ECJ stresses that not every armed conflict will attract protection of art. 15 (c)¹²⁸. Subsequently, the ECJ holds that in cases of extreme indiscriminate violence, the individual link requirement is low and, vice versa, the more the individual is threatened by features or circumstances particular to his or her case, the lower the standard of proof for indiscriminate violence will be. This interpretation constitutes a creative solution by reconciling two contradictory concepts which AG Maduro had described as “prima facie irreconcilable¹²⁹”.

Such interpretation of art. 15 (c) would seem fair since it takes both requirements into account whilst leaving an emergency exit open for certain extreme situations.

¹²⁶ UNHCR Observations submitted to the Court of Appeal United Kingdom on 31st May 2009, in Joined cases No. 1 *QD* and No. 2 *AH v Secretary of State v Home Department*, Appl. Nos. No1. AA/09525/2007, No.2 AA/03993/2007, paragraph 40.

¹²⁷ ECJ C-465/07, *Elgafaji v Staatssecretaris v Justitie*, 17 February 2009, paragraph 35.

¹²⁸ Court of Appeal United Kingdom, Joined cases No. 1 *QD* and No. 2 *AH v Secretary of State v Home Department*, Appl. Nos. No1. AA/09525/2007, No.2 AA/03993/2007.

¹²⁹ Advocate General Maduro Opinion in C-465/07 *Elgafaji v Staatssecretaris v Justitie*, paragraph 31.

The observation in the final paragraph of the *Elgafaji* judgment that the interpretation of the ECJ corresponds to the ECtHR warrants a further analysis of ECtHR jurisprudence.

In cases of general violence the ECtHR will assess conditions in the receiving country against the standards of art. 3 ECHR¹³⁰. Following *N v Finland*, it is in principle for the applicant to provide evidence that there are substantial grounds for believing that upon return the individual will be exposed to treatment contrary to art. 3 ECHR¹³¹. It is up to the government to cast doubt upon such evidence. In principle, the ECtHR will take into account the general situation in the country of origin as well as personal circumstances of the individual¹³². For example, in the admissibility decision *Kaldik v Germany* the ECtHR held that the applicant had not substantiated particular individual circumstances regarding the risk of ill-treatment¹³³. In *Müslim v. Turkey*¹³⁴, the Court rejected the applicant's claim based solely on account of the instable security situation in Iraq. In *Sultani* the ECtHR acknowledged the general situation of violence in Afghanistan, but found that "this, without more, was not sufficient to find a violation of art. 3 ECHR¹³⁵". The words 'without more' indicate that next to a general situation of violence, the individual additionally needs to introduce evidence that shows he or she is targeted due to particular features which concern him individually. This approach was also confirmed in the *Vilvarajah* judgment in which the Court insisted that the applicants show 'special distinguishing features'¹³⁶. From this survey it seems that applicants claiming to be a victim of generalized violence carry a heavy evidential burden since the applicant will, in principle, have to demonstrate both a severe general situation of violence in addition to features or circumstances that concern the applicant individually.

¹³⁰ ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99, paragraph 67.

¹³¹ ECtHR *N v Finland*, Judgment of 26 July 2005, Appl. No. 38885/02, paragraph 167.

¹³² ECtHR, *Vilvarajah v United Kingdom*, Judgment of 30 October 1991, Appl. No. 13163/87.

¹³³ ECtHR, *Kaldik v Germany*, Inadmissibility Decision of 22 December 2005, Appl. No. 28526/05.

¹³⁴ ECtHR, *Müslim v. Turkey*, Judgment of 26 April 2005, Appl. No. 53566/99.

¹³⁵ ECtHR, *Sultani*, Judgment of 20 September 2007, Appl. No. 45223/05, paragraph 67.

¹³⁶ ECtHR, *Vilvarajah v United Kingdom*, Judgment of 30 October 1991, Appl. No. 13163/87, paragraphs 111 and 112.

There are, however, also a few cases in which the ECtHR solely took account of the general situation of violence. For example, in *Ahmed v Austria*¹³⁷ the Court held that the applicant could not be returned without being exposed to ill-treatment on account of conditions in Somalia of which the Austrian government had recognized that there were no observable improvements. Crucially, in *NA v UK*, the Court importantly clarified that it had:

“Never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention¹³⁸.”

It follows that in principle the ECtHR takes into account the general situation as well as individual circumstances. Only in exceptional circumstances of extreme general violence has the ECtHR left open an emergency exit in which it will solely take account of the general situation in a country, when;

“there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence upon return”¹³⁹.

It appears from this survey of Strasbourg case-law that the ECJ was significantly inspired by Strasbourg case-law when interpreting art. 15 (c) since ultimately the two courts set the same requirements in cases of general violence. This becomes even more obvious when comparing paragraphs 36 and 37 of the *Elgafaji* judgment with those of 114 and 115 of the *NA v UK* Strasbourg judgment.

It can be concluded that art. 15 (c) offers the same protection as art. 3 ECHR as interpreted by the Strasbourg Court. Whilst art. 15 (c) at first sight appears to be broader in scope than art. 3 ECHR, in practice it is not, due to interpretation and protection offered by the Strasbourg court. The ECJ has developed a balanced and fair interpretation of art. 15 (c) by taking into account both requirements, i.e.

¹³⁷ ECtHR, *Ahmed v Austria*, Judgment of 17 December 1996, Appl. No. 25964/94.

¹³⁸ ECtHR, *NA v United Kingdom*, Judgment of 17 July 2008, Appl. No. 25904/07, paragraph 115.

¹³⁹ ECtHR, *NA v United Kingdom*, Judgment of 17 July 2008, Appl. No. 25904/07, paragraph 115.

individual link and indiscriminate violence. Importantly, in doing so it has not overruled Member States intentions when drafting the provision. This is particularly important since the individual link requirement was deliberately inserted into the provision and was subject of much debate.

It is therefore striking that the Elgafaji judgment caused substantial turmoil within Dutch politics. Following the judgment, great concerns existed that the importance of specific distinguishing aspects have become less relevant. The Dutch second chamber even convened in an emergency meeting to discuss possible consequences of the ECJ's judgment. Strikingly, however, the interpretation given by the ECJ is similar to that of Strasbourg to which all EU Member States already need to adhere to. In effect, all that the ECJ has done is to rephrase Strasbourg's approach. The ECJ's interpretation is not broader nor is it more far-reaching than that of Strasbourg. The excitement within the Dutch parliament would appear disproportionate. There is no evidence that special distinguishing features have become less relevant.

7.2 Similarities and Differences From the perspective of the individual

From the perspective of the individual, a crucial difference with non-refoulement under the ECHR and subsidiary protection within the Community legal order is that protection under non-refoulement would not guarantee a legal status¹⁴⁰, but would simply classify the individual as non-removable. In contrast, an individual granted EC subsidiary protection is entitled to some minimum basic rights as laid down in the Qualification Directive. For example, the Directive provides for a residence permit of a minimum duration of one year and beneficiaries of subsidiary protection are further entitled to health care, travel documents, employment and integration facilities. From the perspective of the individual, it may thus be better to apply for subsidiary protection as laid down in the Qualification Directive, rather than to turn to human rights guarantees in respect of the ECHR as protected under national law.

¹⁴⁰ See ECtHR *Bonger v the Netherlands*, Judgment of 15 September 2005, Appl. No. 10154/04, in which the Strasbourg Court clearly stated that art. 3 ECHR does not imply a claim for a residence permit.

Other arguments, however, would favor seeking non-refoulement protection under the ECHR. Whereas under the ECHR an individual may make a claim that his removal to another country will interfere with his right to respect for private and family life¹⁴¹, he will not be able to bring such a claim under the Qualification Directive. Furthermore, the personal scope of subsidiary protection is narrower: subsidiary protection criteria only apply to third country nationals and stateless persons, whereas ECHR rights apply to ‘everyone’. In addition, subsidiary protection is made subject to exclusion clauses¹⁴². Thus, whereas a terrorist would not be able to rely on the Qualification Directive to apply for subsidiary protection, he may invoke art. 3 ECHR¹⁴³. Finally, as was mentioned earlier, the wording of art. 15 (b) mirrors that of art. 3 ECHR, save for adding the words ‘in the country of origin’. McAdam has emphasized that this restriction, as appears from the drafting documents of the Directive, was deliberately added in order to prevent persons from relying on ill health grounds from being able to qualify for subsidiary protection¹⁴⁴. Thus, where an individual for reasons of health might be granted protection from refoulement under the ECHR, his or her claim will not be warranted under the Qualification Directive. Since the scope of subsidiary protection is in some instances narrower, it may thus certainly still be beneficial for the individual to rely on ECHR non-refoulement obligations, instead of subsidiary protection as laid down in the Qualification Directive.

7.3 The consequences of dual protection

If subsidiary protection is closely modeled upon ECHR nonderogable rights it would be desirable to have ECJ case-law closely mirror ECtHR case-law. This would certainly be beneficial to Member States who are party to the ECHR, in the way that possibilities of potential conflicts in interpretation are reduced. It would be undesirable if the ECJ were to try to develop its own interpretation of wording

¹⁴¹ See for example, ECtHR *Maslov v Austria*, Judgment of 23 June 2008, Appl. No. 1638/03.

¹⁴² Article 17 EC Qualification Directive.

¹⁴³ See for example, ECtHR *Saadi v Italy*, Judgment of 28 February 2008, Appl. No. 37201/06.

¹⁴⁴ J. McAdam, “The Qualification Directive: an Overview”, in K. Zwaan (ed.) *the Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen 2007, p. 19. McAdam notes the observation made during the drafting of the Qualification Directive at 12148/02 ASILE 43 (20 Sept. 2002): “Consequently, to avoid the inclusion of such compassionate grounds cases (reference was made to *D v United Kingdom*) under a subsidiary protection regime, which was never the intention of this Directive, the Presidency is suggesting to limit the scope of subparagraph (b) by stating that the real risk of torture or inhuman or degrading treatment or punishment must prevail in his or her country of origin”.

deliberately copied from art. 3 ECHR when the ECtHR has developed extensive jurisprudence on such wording¹⁴⁵. The Strasbourg Court is capable of providing the ECJ with ready-made and advanced jurisprudence, which in turn may bolster the integrity of EU human rights protection as a whole¹⁴⁶. This would particularly be beneficial in the realm of asylum law which is considered a sensitive area of legislation. By strongly and explicitly relying on Strasbourg case-law the Member States may be provided with reassurance, thereby improving trust and cooperation between the ECJ and the Member States. As AG Maduro stated:

“It is important in respect of each existing protection system, while maintaining its independence, to seek to understand how the other systems interpret and develop those same fundamental rights in order not only to minimize the risk of conflicts, but also to begin a process of informal construction of a European area of protection of fundamental rights¹⁴⁷.”

Despite the intuitive attraction of dual protection, Storey has emphasized that, as a result of the similarities between EC subsidiary protection and ECHR non-refoulement obligations, the operation of human rights guarantees contained in national law in respect of art. 3 ECHR may be rendered a “largely residual category”¹⁴⁸. He argues that although the Directive itself does not include provisions which modify existing obligations arising out of the Convention, there is nevertheless a “partial displacement of the ECHR”¹⁴⁹. He bases his argument upon the structure of the Directive which requires an applicant to make a claim for asylum and for subsidiary protection. Only after it has been examined whether the applicant qualifies as a refugee or is eligible for subsidiary protection, will it make sense for the decision-maker to consider human rights as guaranteed under national law¹⁵⁰. He therefore

¹⁴⁵ H. Storey, “EU Refugee Qualification Directive: a Brave New World?” *International Journal of Refugee Law*, 2008, Vol. 20, p. 28.

¹⁴⁶ G. Harpaz, “The European Court of Justice and its Relations with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence, and Legitimacy”, *Common Market Law Review*, 2009, Vol. 46, p. 116.

¹⁴⁷ AG Maduro Opinion in C-465/07 *Elgafaji v Staatssecretaris v Justitie*, paragraph 22.

¹⁴⁸ H. Storey, “EU Refugee Qualification Directive: A Brave New World?” *International Refugee Journal*, 2008, Vol. 20, p. 13.

¹⁴⁹ H. Storey, *Ibid* note 148 above, p. 15.

¹⁵⁰ H. Storey, “EU Refugee Qualification Directive: A Brave New World?” *International Refugee Journal*, 2008, Vol. 20, p. 15.

concludes that national human rights guarantees of nonderogable ECHR protection are left as a “somewhat diminished category”¹⁵¹.

In my opinion, however, such controversial statements should be placed in appropriate perspectives. First and foremost because subsidiary protection criteria are, in certain instances, narrower in scope than ECHR nonderogable rights. For example, subsidiary protection excludes claims based upon the right to respect for private and family life, reflecting art. 8 ECHR and is further subject to exclusion clauses.

The possibility for an individual to resort to the Strasbourg Court following prior ruling by the ECJ will guarantee some form of ‘double protection’ in the way that the Strasbourg court double checks whether the Member State act conditioned on the Qualification Directive was in compliance with ECHR non-refoulement obligations. It needs to be clarified that an individual cannot directly approach the ECJ in matters of asylum. However, the Court of Justice answers preliminary references submitted by domestic courts on the interpretation or validity of the Qualification Directive. The Court’s approach must be followed. Often it may be the case that the ECJ has given preliminary reference ruling, the national court renders judgment and the individual can subsequently still apply to Strasbourg for a second opinion. Such second opinion cannot be refused by the ECtHR on grounds that the case has already been ruled upon by the ECJ. An added benefit from the perspective of the individual is that by sequential judgments of both courts the individual can gain the right to remain in the Member State for a period of up to four to five years (in case the ECtHR accepts Rule 39 application¹⁵²) during which it may be hoped that the internal situation in his country of origin may have stabilized.

With reference to the Elgafaji’s, this would form a major incentive for referring their case to the ECtHR. Mr. Hekman, attorney of the Elgafaji’s, has confirmed that Mr. and Mrs. Elgafaji are currently still in the Netherlands. Whilst awaiting the preliminary reference procedure they have been granted a temporary residence permit based upon a categorical policy with regard to the violence in Iraq. This policy has

¹⁵¹ H. Storey, “EU Refugee Qualification Directive: A Brave New World?” *International Refugee Journal*, 2008, Vol. 20, p. 15.

¹⁵² Costa, “Immigration and Human Rights Law in the case law of the ECHR”, Speech to Inner Temple, 23 March 2009.

however ended and the possibility that their residence permit will be re-invoked is present. In these circumstances, applying to the ECtHR will not only provide them with a ‘double check’, but will also provide them more time during which they are able to extend their stay in the Netherlands for at least up to two more years¹⁵³.

In general, however, it may be questioned whether it would be beneficial for an individual to go to Strasbourg, when taking into account that criteria for subsidiary protection are closely modeled upon non derogable ECHR rights, art. 3 in particular. If an individual thus fails to meet criteria to qualify for subsidiary protection, it is most likely that he or she will also fail to meet criteria under art. 3 ECHR. In this regard, it must be emphasized that there is no guarantee the ECtHR will give a similar interpretation on the set requirements as the ECJ. Especially, since no formal linkage exists between the two courts, it might be the case that the ECtHR interprets a case differently than the ECJ has done. Due to this missing formal link and without any hierarchy between the two courts, it may thus be questioned whether different rulings on the same subject-matter and by large analogous normative legislation are conceivable? In principle, neither the ECJ nor the Strasbourg Court are bound by each other’s interpretations. The ECJ in particular has been resolute not to tie its own hands and has rejected the argument that the ECHR may impose duties on EC institutions, or that the interpretations offered by the Strasbourg Court to the ECHR are binding upon it¹⁵⁴. Instead, the ECJ has insisted that it is free to offer its own, divergent jurisprudence of EU law¹⁵⁵. Also in the *Elgafaji* case the ECJ emphasizes its intention to interpret art. 15 (c) autonomously and independently from Strasbourg case-law.

¹⁵³ Assuming the ECtHR accepts Rule 39 application.

¹⁵⁴ G. Harpaz, “The European Court of Justice and its Relations with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy”, *Common Market Law Review*, Vol. 46, 2009, p. 110; See for support R. Lawson, “Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg”, in Lawson and de Blois (eds), *the Dynamics of the Protection of Human Rights in Europe-Essays in Honour of Henry G.S. Schermers*, Vol. III, Martinus Nijhoff, Dordrecht, 1994, p. 231.

¹⁵⁵ In ECJ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, the ECJ stressed that it is not bound by interpretation of the ECHR offered by the Strasbourg Court, but that it is free to offer its own, divergent jurisprudence of EU law, reiterating the fundamental, inherent differences between the two regimes; See also Wetzel, “Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion between the Luxembourg and Strasbourg Courts”, *Fordham Law Review*, 2003, Vol. 71, p. 2893: By acknowledging the rights found within the ECHR without allowing the EC to sign the Convention, the ECJ reassured itself of not being made subservient to the Strasbourg Court; See also G. Harpaz, “The European Court of Justice and its Relations with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy”, *Common Market Law Review*, 2009, Vol. 46, p. 110.

There are a few cases in which the ECJ has departed from verdicts of the Strasbourg Court¹⁵⁶. Despite the claims to independence and autonomy the question can be raised whether it is likely that the Strasbourg Court will ever in practice depart from ECJ case-law.

In principle, there are no formal rules guiding the relationship between the ECJ and ECtHR. Consequently, if a conflict were to arise between the two courts, there would be no obvious way of resolving them¹⁵⁷. In absence of such formal links and guidelines, the two courts have established cooperation mechanisms. Both courts have increasingly referred to each other's judgments indicating a willingness to cooperate instead of making a complex legal situation even more convoluted. By acknowledging and indeed following the ECJ in its interpretation, the Strasbourg Court "acknowledges its engagement in a common enterprise, an acknowledgment that implies the possibility of an objectively 'better' legal solution to a common legal problem..."¹⁵⁸ In the situation that the Strasbourg court overturns a Luxembourg judgment, consequences would be dire and highly problematic since it would threaten the ECJ's supremacy and undermine its legitimacy, thereby consequently hindering its ability to protect fundamental human rights. It seems that the ECtHR is fully aware of this and, so far, no Luxembourg judgment has yet been overturned by a Strasbourg judgment. Instead, Luxembourg and Strasbourg case-law has generally been in line. It may, however, be questioned how far this cooperation between the two courts reaches? If Strasbourg is confronted with a case in which it absolutely does not agree with the ECJ's given interpretation, will the ECtHR depart from it? The Strasbourg court has developed specialized human rights jurisprudence for over fifty years and may therefore in all frankness be considered the 'more specialized human rights court'. Although it has been increasingly willing to cooperate with the ECJ, it has also shown itself willing to accept jurisdiction to review cases involving EC measures, even in cases such as *Bosphorus* in which the ECJ has already ruled upon the issue.

¹⁵⁶ See Spielmann, "Human Rights Case Law in the Strasbourg and Luxembourg Courts-Conflicts, Inconsistencies, and Complementarities", in Alston, *the EU and Human Rights* (OUP, 1999), p. 757.

¹⁵⁷ Costa, "The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice", Lecture at King's College London, October 2008, p. 10.

¹⁵⁸ Helfner and Slaughter, "Towards a Theory of Effective Supranational Adjudication", 107 *Yale Law Journal* (1997-1998), p. 326.

This would seem to indicate that Strasbourg considers itself the final arbiter when it comes to human rights protection. It may be the case therefore that the Strasbourg court departs from Luxembourg jurisprudence. This, it seems, would solely happen in case the Strasbourg court considers that the ECJs interpretation severely undermines ECHR protection.

The likelihood of Strasbourg overruling Luxembourg is, however, significantly increased by the exclusion clauses of the Qualification Directive which are in direct contrast to the absolute character of art. 3 ECHR.

Finally, following the *Bosphorus* judgment, it needs to be considered whether the Strasbourg Court will exercise full jurisdiction when a complaint is brought against a Member State act conditioned on the Qualification Directive. It is recalled that following this judgment there exists a rebuttable presumption that the Community provides for an equivalent level of human rights protection. It follows that under certain circumstances, EC protection of human rights replaces ECHR protection of human rights. Only if protection of ECHR rights under the EC legal order were to be found by the Strasbourg Court to be “manifestly deficient”, will the Strasbourg court exercise full jurisdiction and would the ECHR Members be accountable for a breach of an ECHR right. Put in other words, by providing an optimum level of human rights protection within the Community legal order, the Strasbourg Court may be ‘pre-empted’, in that it is induced not to review EC measures¹⁵⁹. It is not the case that the Strasbourg court is prevented from hearing a case. Rather, the concrete effect of the presumption that the EC offers an equivalent level of protection is that the Strasbourg court will refrain from a detailed examination of the applicant’s claim¹⁶⁰, since Member State acts based on Community law are presumed to be in accordance with the ECHR. If the individual is convinced that a Member State act was not in compliance with the ECHR, the way to Strasbourg is still open to argue that there has been a ‘manifest deficiency’. Clearly, however, access to the Strasbourg court is made

¹⁵⁹ G. Harpaz, “The European Court of Justice and its Relationship with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy”, *Common Market Law Review*, 2009, Vol. 46, p. 135.

¹⁶⁰ Costa, “The Relationship between the European Convention on Human Rights and European Union Law-A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice”, Lecture at King’s College London, October 2008, p. 6.

more complicated and it may be considered that the equivalent protection doctrine adversely affects the individual.

Consequently, the question arises as to whether the equivalent protection doctrine applies in the realm of asylum and more specifically, whether, in the situation that the Elgafaji's lodge their case to Strasbourg, the ECtHR will exercise full jurisdiction. With regard to the first more general question, it may be questioned whether the Bosphorus doctrine of equivalent protection may be extrapolated to asylum cases. From an abstract perspective, the Elgafaji case differs substantially from the Bosphorus case and it is most dubious, to say the least, whether the removal of a person can be likened to the seizure of an airplane. Moreover, the prohibition on refoulement includes a negative obligation on the part of the Member State whereas the Bosphorus case concerned a positive obligation (seizure of the airplane). The ECtHR has frequently emphasized the importance and absolute nature of the prohibition on refoulement. Most specifically it has called attention to the irreversible damage as a consequence of the act of removal. In such circumstances, it is highly unlikely that the ECtHR will presume that the Community legal order has provided sufficient protection and based upon this assumption neglects to fully review the case. If it were to do so, it may be stated that the ECtHR provides the individual with 'illusory' protection, whilst this is something the ECtHR has frequently strongly rejected. Secondly, it is recalled that a crucial distinction has to be made between EC measures that leave discretion and EC measures that do not. Judge Wildhaber, President of the ECtHR, has confirmed that the equivalent doctrine only applies if the state "does no more than implement legal obligations flowing from its membership of the organization"¹⁶¹. Subsequently, acts by Member States based on EC law that leave no discretion are subject to 'usual' judicial supervision by the ECtHR whereas acts that leave no discretion are not¹⁶². Subsidiary protection is laid down in the Qualification Directive. By its nature, a Directive leaves it up to the Member States to decide upon appropriate measures for implementation¹⁶³. The Qualification Directive

¹⁶¹ Wildhaber, "The Coordination of the Protection of Fundamental Rights in Europe", Address by the President of the European Court of Human Rights, Geneva, 8 September 2005.

¹⁶² H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Nijhoff Publishers, 2006, p. 585.

¹⁶³ Art. 249 EC Treaty stipulates: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

indeed leaves the Member States a considerable amount of discretion. With regard to the Elgafaji case, the Netherlands Council of State was also left a margin of discretion when applying the ECJ's given interpretation from the preliminary reference ruling to the facts of the case. Finally, the fact that the ECtHR has ruled upon various asylum cases after its Bosphorus ruling and after the introduction of the Qualification Directive indicates that the equivalent protection doctrine is likely not to be extrapolated to the realm of asylum law. Therefore, with regard to Elgafaji it may be concluded, if they were to lodge a complaint before Strasbourg, that it is likely that the ECtHR will exercise its usual full jurisdiction. In this way, the Elgafaji's are provided with a 'double check' which can be likened to the second opinion in the medical world. Clearly, the system provides the individual with dual judicial protection.

A consequence of this dual system is however, that if the case is referred to the ECtHR following preliminary ruling of the ECJ, the expulsion or extradition may be delayed for up to two to three years. One of the main aims of an EU harmonized asylum policy is, however, to provide for a fast and efficient asylum procedure¹⁶⁴. Since the large majority of asylum seekers in the EU pursue unfounded claims, dual protection certainly does not contribute to this aim. Moreover, from the perspective of the Member States, such delays may have substantial consequences by further increasing the numbers of people seeking asylum.

7.4 Synthesis

There are various elements analogous and this confirms the statement that subsidiary protection is the codification of non-refoulement obligations under the ECHR. Yet, some differences can be detected. In chapter 5, I noted that the provisions of art. 15 (c) e.g. situation of general violence, would appear broader in scope than art. 3 ECHR. However, on a more critical analysis, this would not appear to be the case. The Strasbourg court has interpreted art. 3 ECHR as to include situations of general violence and has even recognized that in certain extreme circumstances the applicant

¹⁶⁴ K. Hailbronner, "Principles of International Law Regarding the Concept of Subsidiary Protection", in D. Bouteillet-Paquet, *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* Bruylant: Brussels, 2002, p. 17.

will not have to demonstrate to be individually targeted. The ECJ has interpreted art. 15 (c) in a similar manner in the *Elgafaji* case. From the perspective of the individual, the grant of subsidiary protection under the Qualification Directive may be more beneficial, specifically because the individual may benefit from entitlements to certain minimum rights. Other arguments, however, would favor protection of non-refoulement under the ECHR. Particularly, where the scope of art. 3 ECHR is broader. This is the case with regard to the personal scope which extends to “everyone”, claims based on respect to private and family life ex art. 8 ECHR, and finally the absolute character of non-refoulement. The introduction of the Qualification Directive has as a consequence that asylum seekers are protected by dual protection and double judicial supervision. If an individual case is sequentially judged upon by the ECJ and the ECtHR, the individual is able to extend its stay up to 5/6 years. From the perspective of the individual this is certainly beneficial and may in certain instances literally be life saving. Dual judicial supervision however does not contribute to a fast and efficient system. Moreover, from the perspectives of the Member States such delays may significantly increase the numbers of people seeking asylum. Dual judicial supervision raises more pertinent questions in regards the possibility of conflicting interpretations in absence of a formal link and hierarchy. Analysis shows that risks of conflicting interpretations are significantly reduced due to devoted cooperation between the two courts. Such cooperation is to the benefit of Member States, but may be to the detriment of the individual. Illustrative for the cooperation is the *Bosphorus* doctrine of equivalent protection. This doctrine may, in theory, adversely affect an individual as access to Strasbourg is made more complicated. Analysis has indicated that it is highly unlikely for the doctrine to apply to asylum cases. Question remains, however, how far cooperation reaches? The degree of cooperation is still uncertain and, in particular, the exclusion clauses in the Qualification Directive may instigate conflict.

8. Conclusion

This thesis has been written out of a genuine desire to contribute to scholarly debate on the recently introduced Qualification Directive. The focus has been on subsidiary protection which is closely modeled upon ECHR non-derogable rights, specifically the prohibition of refoulement. The subject area thus touches upon the complexities of the relationship between the Community legal order and the ECHR. As discussed in chapter 3, the two regimes are independent and its Member States bound under both, whilst the Community itself is not party to the ECHR. Consequently, pertinent questions arise as to how subsidiary protection relates to non-refoulement obligations. Differences between the two protection mechanisms may have implications for the individual in need of protection, as also for the Member States.

It has been argued that the Qualification Directive represents a codification of ECtHR non-refoulement jurisprudence, but some differences do exist, particularly in relation to the conditional elements a) the nature and degree of harm that the individual may be subjected to, and b) the probability that subjection to harm will occur. Both require “substantial grounds for believing that a real risk exists”, but the Qualification Directive adds that the risk should be present in the ‘country of origin’, thereby excluding humanitarian cases. Art. 15 (b) pertaining to the nature of harm is almost an exact copy of art. 3 ECHR and art. 15 (c) adds an additional element pertaining to situations of general violence. This feature is not covered by art. 3 ECHR. Consequently, art. 15 (c) focusing specifically upon the individual link requirement warranted special focus. The case study of *Elgafaji* and subsequent analysis in Chapter 7 (7.1) has helped determine whether different perspectives exist between the ECJ and the ECtHR with regard to the individual requirement of the risk. The ECJ’s preliminary reference in the *Elgafaji* case and an in depth review of Strasbourg case-law indicated that both courts have similar perspectives. Usually, an individual link is required in addition to a general situation of violence. This individual link may, however, be waived in certain exceptional circumstances where the degree of violence reaches such a high level that an individual is threatened simply by his presence on the territory. The case-study on *Elgafaji* has therefore demonstrated that the ECJ’s interpretation is in accordance with the ECHR. I conclude that by large, the respective legislations correspond to each other, but, certain differences do exist. Due to

interpretation by the Strasbourg court, however, the difference pertaining to art. 15 (c) is more academic than present in practice. ([Research question 1](#)).

Concern for a diminished importance of specific distinguishing requirements following the Elgafaji ruling would appear disproportionate and based upon inconsiderate concerns. Interpretation by the ECJ on art. 15 (c) is in line with Strasbourg case-law and protection provided is not more far-reaching. ([Research question 2](#)).

As a consequence of the missing link between the ECJ and the ECtHR and in absence of hierarchy between the two courts, there is a possibility of different rulings on similar issues of complementary protection. Chances of different rulings are, however, reduced by devoted cooperation between the two courts and are further significantly diminished by a similar interpretation on the individual requirement. Although in theory the Strasbourg court could overturn an ECJ ruling, in practice this has never happened. Instead, a consensus approach is preferred. Differences between the respective legislations as discussed in chapter 5, however, increase possibilities of different rulings. Particularly, with regard to the troublesome exclusion clauses, it is to be expected that the ECtHR may not compromise on the absolute character of art. 3 ECHR. ([Research question 3](#)).

The dual judicial supervision may be considered an asset for the individual in need of protection, not only as a system providing possibilities for a second opinion, but also from the practical perspective that judicial proceedings take up several years during which the individual is allowed to stay in the host country. This may, in certain instances, literally be life saving. Following the Bosphorus ruling the potential that the individual might be adversely affected by the equivalent protection doctrine is present, but analysis shows that it is highly unlikely that the doctrine is extrapolated to asylum cases. Dual protection is beneficial to the individual seeking protection. The perspective of the Member States may be different as the extended procedures will increase the numbers of asylum seekers at a given time of period. ([Research question 4](#)).

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